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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLIED CORPORATION,

Petitioner,

v.

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113, and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; and JOHN RAMEY and JOSEPH MCCARDLE, on Behalf of Themselves and Others Similarly Situated,

and

THE UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. May a court, acting under Section 301 of the Taft-Hartley Act, predict the outcome of collective bargaining and devise a remedy based upon its prediction when Section 8(d) of the National Labor Relations Act prohibits the National Labor Relations Board from doing so?

2. May a court, in predicting the outcome of collective bargaining and devising a Section 301 remedy on that basis, presume that the union would have violated the National Labor Relations Act by insisting upon a contract covering a permissive subject of bargaining?

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INTEREST AND CONCERN OF THE AMICI

On behalf of the businesses they represent, the Chamber of Commerce of the United States [1] ("Chamber") and the

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[1] The Chamber's membership consists of over 180,000 corporations, partnerships and proprietorships as well as several thousand trade and professional organizations and state and local chambers of commerce.

National Association of Manufacturers[2] ("NAM") urge the Court to grant the petition and hear this case on the merits because of its overriding importance to the administration of federal labor law.[3] This case arises under the federal courts' original jurisdiction to adjudicate violations of collective bargaining agreements, a jurisdiction granted by Section 301 of the Taft-Hartley Act of 1947. Based on its powers under Section 301, the *en banc* majority below rendered a decision that conflicts directly with this Court's interpretation of Section 8(d) of the National Labor Relations Act ("NLRA"), another section added by the Taft-Hartley Act. If the *en banc* majority's decision were entered by the National Labor Relations Board ("NLRB"), it would be unlawful. Accordingly, if a uniform national labor policy is to be maintained, the decision below must be reversed.

Here, the Fourth Circuit *en banc* majority, reading its authority to "do equity" more expansively than established national labor policy permits, has remedied a selling employer's failure to make a purchasing employer accept a particular contract term by concluding that (i) but for the failure, the purchaser would have accepted the contract term in subsequent collective bargaining agreements, and that (ii) the seller should continue to honor the contract term indefinitely, beyond the expiration of the seller's collective bargaining agreement, as a substitute for the purchaser's agreement to do so. The Fourth Circuit *en banc* majority thus writes a contract for the parties in the guise of a remedy, ignoring the refusal of Congress to permit the NLRB—which has pri-

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[2] The NAM is a voluntary business association of over 13,000 corporations. NAM member companies employ eighty-five percent of all manufacturing workers and produce over eighty percent of the nation's manufactured goods. In addition, the NAM is affiliated with 158,000 businesses through its Associations Council and the National Industrial Council.

[3] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Court Clerk.

mary jurisdiction over bargaining questions—to engage in the imposition of contract terms.

Compounding this fundamental departure from national labor policy, the Fourth Circuit *en banc* majority uses an impermissible predicate in its speculation over the outcome of bargaining—it assumes that the union would have been able to insist upon the renewal of the contract term in question, which provided for the payment of health benefits to retirees. Despite the fact that Congress has prohibited the NLRB from treating retiree benefits as a mandatory subject of bargaining, and despite the fact that the NLRA bars unions from insisting in bargaining that an employer agree to provide retiree benefits, the *en banc* majority's result presumes that the union would have insisted upon bargaining for retirees as though retiree benefits were a mandatory subject of bargaining.

The Chamber and the NAM, together with their affiliates, represent several hundred thousand businesses that have a vital interest in ensuring that lower courts give proper deference to national labor policy as established in fifty years of legislation by Congress and interpretation by this Court. The cost in certainty and in judicial and private party resources will be substantial if lower courts feel free to construct new theories to accomplish results forbidden to the NLRB by Congress and this Court. The suggestion implicit in the decision of the Fourth Circuit *en banc* majority—that the courts acting under Section 301 can simply ignore this Court's interpretations of national labor policy where addressed to the NLRB—has the potential for great mischief and presents questions of overriding importance that warrant this Court's attention.

STATEMENT

The Petitioner, Allied, requests the Court to reverse a 5-4 *en banc* decision of the United States Court of Appeals for the Fourth Circuit. Pet. at 1a. The *en banc* majority reversed a 2-1 Fourth Circuit panel decision,

Pet. at 21a, which in turn reversed a decision of the United States District Court for the Southern District of West Virginia, Pet. at 53a.

The dispute between Allied and the United Mine Workers of America ("UMWA") arose out of the 1978 National Bituminous Coal Wage Agreement ("1978 Agreement"), the 1978 version of a master collective bargaining agreement renegotiated every three years between the UMWA and the Bituminous Coal Operators Association. Pet. at 5a. The 1978 Agreement, which expired on March 26, 1981, required the employers to provide health insurance benefits to their retirees covered by the UMWA 1974 pension plan, and in the event an employer sold its company, to pass on all contract obligations to the successor. Pet. at 10a-11a.

In 1980, Allied sold its covered operations to Armco, Inc. ("Armco") and Shannon Pocahontas Coal Company ("Shannon Pocahontas"). Pet. at 6a. All three companies were signatories to the 1978 Agreement. Under the terms of the transfer agreements, Armco and Shannon Pocahontas did not assume Allied's obligation to provide health insurance benefits for its retirees. Instead, Allied continued to pay those health insurance benefits until after the expiration of the 1978 Agreement. Pet. at 6a-7a. As the *en banc* majority acknowledges, that "obligation existed only for the life of the 1978 contract, which expired in 1981 . . . ." Pet. at 11a. Accordingly, the retirees received all of the benefits to which they were entitled under the 1978 Agreement.[4]

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[4] For that reason, the Fourth Circuit panel decision reversed the district court's judgment against Allied. It found that Allied's obligation to provide retiree health insurance benefits terminated on March 26, 1981, the day the 1978 Agreement expired. Pet. at 30a-31a. Accordingly, the panel held that the retirees had suffered no loss and therefore were not entitled to damages. Pet. at 32a. The panel based that decision on *Baltimore Regional Joint Bd. v. Webster Clothes, Inc.*, 596 F.2d 95 (4th Cir. 1979), in which the Fourth Circuit recognized that "a party must have suffered some

Armco and Shannon Pocahontas, but not Allied, signed the renegotiated 1981 and 1984 national wage agreements. Pet. at 6a. Those agreements obligated Armco and Shannon Pocahontas to provide health insurance benefits for their retirees, but not for Allied's retirees. Pet. at 11a. Shortly after the expiration of the 1978 Agreement, Allied stopped paying for retiree health insurance benefits. Pet. at 7a. When the 1974 Benefit Plan and Trust ("1974 Benefit Trust") refused to assume the obligation, the UMWA instituted this lawsuit against Allied, Armco, Shannon Pocahontas, and the 1974 Benefit Trust.

Reversing the district court, the appellate panel decision held that the 1974 Benefit Trust—not Allied—was liable for the retiree benefits after 1981. Pet. at 25a-26a. Despite the fact that the contractual obligation to pay health insurance benefits ceased with expiration of the 1978 Agreement, and despite the fact that the retirees received their full contractual benefits to the end of 1981, the *en banc* majority reversed the panel decision and held that Allied—not the 1974 Benefit Trust—was liable after 1981. Pet. at 4a. As a remedy, the *en banc* majority approved the district court's injunction requiring Allied to continue paying the health insurance benefits after 1981 *until the successors agreed to do so.* Pet. at 19a. While the *en banc* majority absolved the 1974 Benefit Trust of any liability, Pet. at 4a, it also protected the retirees against all contingencies by noting that if Allied were not responsible, "it seems clear that the Trust Fund in those circumstances would be responsible," Pet. at 20a n.10.

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legally cognizable loss" to be entitled to an award of damages under a collective bargaining agreement. *Id.* at 98; Pet. at 32a. *See also Westinghouse Elec. Corp. v. IBEW*, 561 F.2d 521 (4th Cir. 1977), *cert. denied*, 434 U.S. 1036 (1978).

ARGUMENT

I. THE FOURTH CIRCUIT *EN BANC* MAJORITY VIOLATES NATIONAL LABOR POLICY BY PREDICTING WHAT THE PARTIES WOULD HAVE AGREED TO IN A SUCCESSOR COLLECTIVE BARGAINING AGREEMENT AND IMPOSING THAT PREDICTION AS A REMEDY FOR THE BREACH OF A PREDECESSOR COLLECTIVE BARGAINING AGREEMENT.

Federal courts "must fashion [federal labor law under Section 301] from the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). In this case, the Court of Appeals for the Fourth Circuit *en banc* ignores that admonition. Instead, the majority reaches a decision that contravenes national labor policy by basing a remedy for breach of a collective bargaining agreement on the majority's prediction that "[i]f Allied had not breached the 1978 contract, the complaining retirees very probably would have been covered by Armco and Shannon Pocahontas until the expiration of the 1984 contract and thereafter . . . ." Pet. at 18a.

The Fourth Circuit has recognized that this Court's decision in *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), bars the NLRB from engaging in precisely this kind of predictive bargaining analysis: "The notion that the Board may require a party to comply with what it speculates the outcome of negotiations would have been had good-faith bargaining taken place clearly contravenes the holding of *H. K. Porter* . . . ."[5] *NLRB v. Atlantic International Corp.*, 664 F.2d 1231, 1233 (4th Cir. 1981). In short, "*Porter* forbids the Board from requiring a

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[5] Subsequent Supreme Court decisions have reaffirmed the importance of that policy. *E.g., NLRB v. Bildisco and Bildisco*, 104 S.Ct. 1188, 1200 (1984); *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212, 218-19 (1979).

company and a union to bargain to a foreordained result." *Id.*

The *en banc* majority's decision here—like the NLRB's decision condemned by the Fourth Circuit in *Atlantic International*—"goes even a step beyond *Porter*." *Id.* It determines the legal relationship between the parties as though an agreement between the union and the various companies, which concededly had not been reached, had been reached. That decision then orders Allied to pay until it is able to secure the agreement with the successor companies that the *en banc* majority believes they should have agreed to.[6]

There is no way to reconcile the *en banc* decision with *H. K. Porter* and *Atlantic International* except to postulate that Congress intended to bar the NLRB, but not the courts, from predicting the outcome of collective bargaining and then imposing that prediction as a remedy. Such a result, however, is so destructive of the purpose of the Taft-Hartley Act that it is inconceivable.

Congress wrote Section 8(d) into the National Labor Relations Act to stop the NLRB " 'from controlling . . . the terms of collective bargaining agreements.' " [7] *H. K. Porter Co.*, 397 U.S. at 106 (citation omitted). As part of the Taft-Hartley Act, Congress also enacted Section 301, giving the courts jurisdiction over collective bargaining agreement violations. Surely a Congress determined to eradicate an evil being practiced by the NLRB could not

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[6] The Fourth Circuit in *Atlantic International* faulted the NLRB for going "even a step beyond *Porter* in requiring the parties to act as though they had bargained to a conclusion when no such bargaining in fact had taken place," *id.*, which is what the Fourth Circuit itself has done here.

[7] *See Carbon Fuel Co.*, 444 U.S. at 219 ("[T]o make crystal clear the intention to leave the parties entirely free of any Government compulsion to agree to a proposal, or even to reach an agreement, Congress added § 8(d) . . . .").

have intended at the same time to authorize the courts to engage in the same evil. Indeed, *H. K. Porter*, although addressed to the NLRB, recognizes that the NLRB and the courts are equally bound to honor the spirit of Section 8(d): "[I]t is the job of Congress, *not the Board or the courts*, to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands." 397 U.S. at 109 (emphasis added).

Contrary to the policy enunciated in *H. K. Porter* and the Fourth Circuit's own interpretation of that policy in *Atlantic International*, the *en banc* majority bases its decision upon what it believes the union and the various companies would—and should—have agreed to. That decision, if left standing, would create a separate national labor policy for bargaining issues arising in Section 301 cases, allowing the courts to exercise a power that the Board under Section 8(d) may not exercise, and opening a dangerous competition for the leadership role in the implementation of national labor policy.

II. THE FOURTH CIRCUIT *EN BANC* MAJORITY VIOLATES NATIONAL LABOR POLICY BY PRESUMING THAT THE UNION WOULD HAVE INSISTED UPON A CONTRACT COVERING A PERMISSIVE SUBJECT OF BARGAINING WHEN SUCH INSISTENCE WOULD HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT.

According to the *en banc* majority, if Allied had "required Armco and Shannon Pocahontas to assume the disputed benefit obligations, *it is obvious* that the UMWA would have *insisted* that the latter two employers bargain concerning the continuation of this coverage in succeeding contract talks." Pet. at 18a (emphasis added). Under the Supreme Court's holding in *Allied Chemical & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), however, the UMWA could *not* have so insisted in subsequent contract talks.

"Nowhere in the history of the National Labor Relations Act is there any evidence that retired workers are to be considered as within the ambit of the collective-bargaining obligations of the statute." *Id.* at 166.

Pittsburgh Plate Glass held that bargaining over retiree benefits is permitted, but not required. *Id.* at 176-82. Indeed, while "it is lawful to insist upon matters within the scope of mandatory bargaining . . . , [it is] *unlawful* to *insist* upon matters without . . . ." *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (emphasis added). Accordingly, had the union "insisted" on bargaining over retiree benefits, as the *en banc* majority presumes, the union would have committed an unfair labor practice.

The fact that the insistence envisioned by the *en banc* majority would have been insistence on a continuation of benefits agreed to in past contracts does not make the union's insistence any less unlawful. "By once bargaining and agreeing on a permissive subject, the parties, naturally, do not make the subject a mandatory topic of future bargaining." *Pittsburgh Plate Glass*, 404 U.S. at 187.

It is unthinkable that a federal court would reward one of the parties before it on the basis of a prediction that the party should have earned the award by successfully committing an unlawful act, if only it had been given the opportunity. Yet, by asserting its independence from the restrictions of the NLRA and by ignoring *Pittsburgh Plate Glass* and *Borg-Warner*, the Fourth Circuit has stepped into that very trap. The damage to national labor policy is obvious, substantial, and in need of correction by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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